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In the Supreme Court of the United States

OCTOBER TERM. 1925.

No. [redacted]87

GEORGE M. NAPIER, Attorney General of the State of Georgia,

Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF OF APPELLANT.

GEORGE M. NAPIER,
Atty. General of the State of Georgia.

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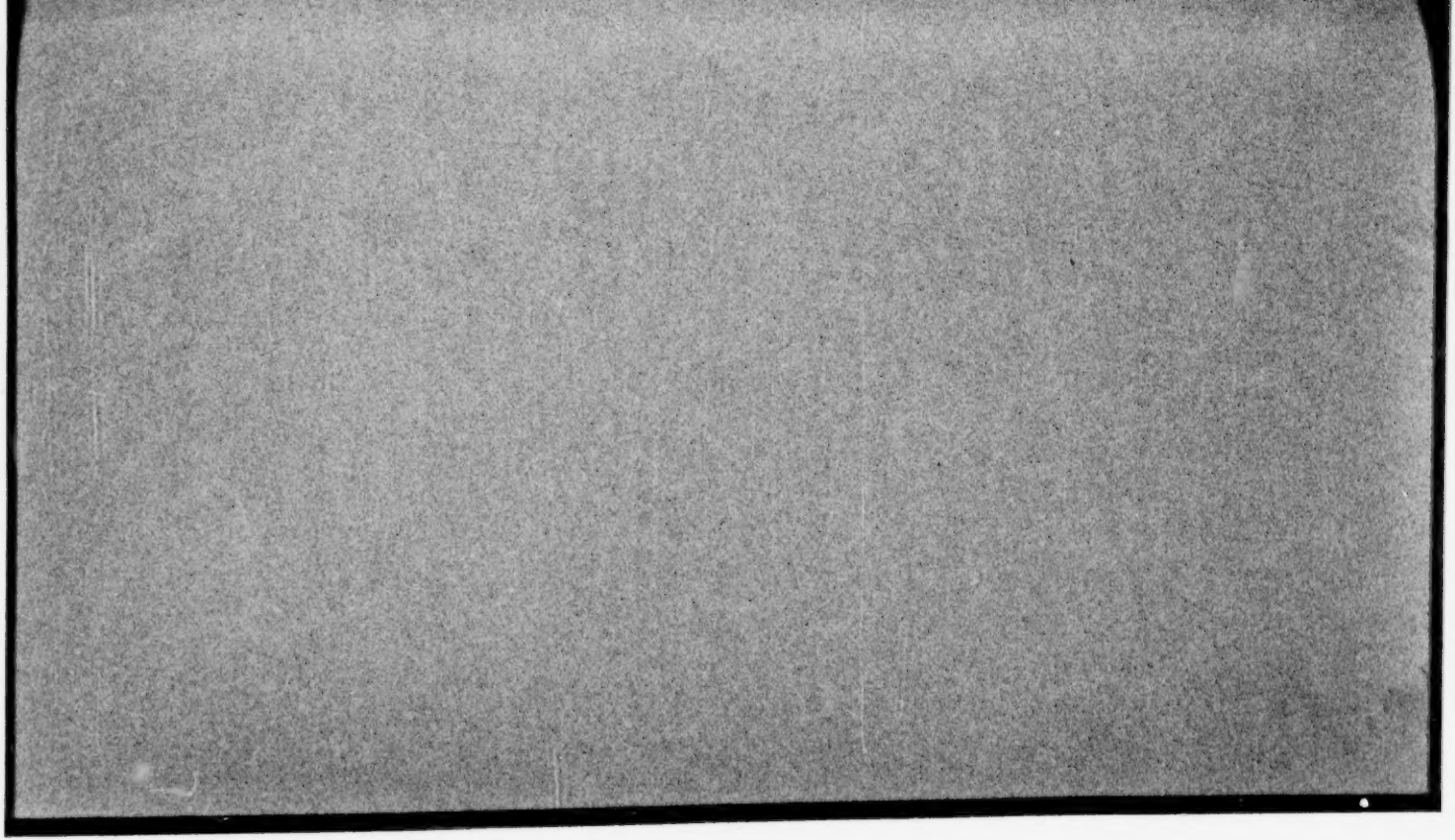
Cleveland, Ohio.



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In the Supreme Court of the United States

October Term. 1925.
No. 386.

George M. Napier, Attorney General of the State of Georgia,
Appellant,

vs.

Atlantic Coast Line Railroad Company,
Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

BRIEF OF APPELLANT.

REPORT OF OPINION IN COURT BELOW.

The opinion of the District Court is reported in *Atlantic Coast Line R. Co. vs. George M. Napier, Attorney General, et al.*, 2 Fed. Rep. 2nd Series 891.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment in this case was filed December 23rd, 1924. (R. 17.) The Bill of Complaint alleged, by amendment filed and allowed December 19th, 1924 (R. 11) that an act of the legislature of the State of Georgia is void for the reason that it violates the Commerce Clause of the Constitution of the United States of America. The Court below held (R. 18) the act to be invalid in so far as it undertakes to apply to locomotives within the provi-

sions of the Act of Congress approved February 17, 1911, and the Act amending the same approved March 4th, 1915, and the Act approved June 7, 1924, further amending the same, the original Acts of Congress being entitled:

> "An Act to promote the safety of employes and travellers upon railroads, by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

This appeal is brought under Judicial Code Sec. 238; Sec. 1215 Comp. Stat. 1918, 36 Stat. at L. 1157, Chap. 231, which provides, among other things, that:

> "Appeals and Writs of Error may be taken from the district courts * * * direct to the Supreme Court in the following cases; * * * and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Hays vs. Seattle, 251 U. S. 233, 64 L. ed. 243, 40 Sup. Ct. 125;

Greene vs. Louisville & Interurban R. Co., 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. 673;

Myles Salt Company vs. Board of Commrs., 239 U. S. 478, 60 L. ed. 392;

Shaffer vs. Carter, 252 U. S. 37, 44; 64 L. ed. 445, 453.

STATEMENT OF THE CASE.

This is an appeal from a final decree entered in the District Court of the United States for the Northern District of Georgia, Northern Division, adjudging an Act of the State of Georgia to be invalid and enjoining the defendants from applying the provisions of the said Act to the locomotives of the complainant.

At its 1924 Session the Legislature of the State of Georgia enacted a law which was approved on the 13th

day of August 1924 (1924 Laws of Georgia 173) said Act being entitled:

"An act to require all steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this State, to provide and equip each and every steam locomotive so operated over its said road or roads in this State with an automatic door to the firebox of such locomotive engine; to provide how the same shall be constructed and operated; to provide a penalty for steam railroad company who fails to provide and maintain in good condition such automatic fire box doors, and for other purposes.

SECTION 1.

Be it enacted by the General Assembly of the State of Georgia and it is hereby enacted by authority of the same, That all steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this State, shall provide and equip each and every steam locomotive engine so operated over its said road or roads in this State with an automatic door to the fire box of such locomotive engine. Such automatic door shall be so constructed and operated by steam, compressed air or electricity, as deemed best and most efficient by officer of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman of said engine by means of a push button or other appliance located on the floor of the engine deck or floor of the tender at a suitable distance from such floor to enable the fireman while firing such engine by pressure with his feet to operate such door for firing of such engine.

SECTION 2.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, That each and every steam railroad company failing to provide and maintain in good condition and working order an automatic fire box door

as in the first section of this Act required and provided for, shall be guilty of a misdemeanor and shall be liable to a fine of not less than One Hundred Dollars nor more than Five Hundred Dollars for each and every day such locomotive is operated in this State without such automatic door: Provided, however, That the provisions of this Act shall not apply to locomotive engines weighing less than 125,000 pounds on the driver or less than 21 inch cylinders, or logging or tramroads or mechanical fired engines."

On the 12th day of November, 1924, the Atlantic Coast Line Railroad Co., appellee, filed its bill of complaint in the District Court of the United States for the Northern District of Georgia, Northern Division, praying that George M. Napier, Attorney General of the State of Georgia, appellant, be enjoined from enforcing said Act of the State of Georgia and that said Act be declared null and void for the following reasons:

(a) Jurisdiction of this subject has been taken by the Congress of the United States of America, especially under the Acts of Congress known as the Federal Boiler Inspection Act, the original of which was approved February 17, 1911, and an amendment thereto, which was approved on March 4, 1915. (R. 5.)

(b) The said Act of the Georgia Legislature is a burden upon interstate commerce and is in violation of the section of the Constitution of the United States empowering Congress to regulate commerce between the states and foreign countries. (R. 6.)

(c) If appellee should adopt one kind of automatic fire box door and the Interstate Commerce Commission under the powers conferred upon it by the aforementioned Acts of Congress should order another, the ones installed would then be useless. (R. 7.)

(d) Appellee further avers that the aforementioned Act deprives appellee of its property without due process of law and deprives it of equal protection of the law, contrary to the provisions of the Four-

teenth Amendment to the Constitution of the United States. (R. 7.)

(e) The Act of the Legislature of the State of Georgia is void for the reason that it violates the commerce clause of the Constitution of the United States of America. (R. 11.)

The appellee relies upon the Federal Boiler Inspection Act 36 Stat. L. 913, approved February 17, 1911, and Amendment thereto of March 4, 1915, 38 Stat. L. 1192 and contends that by these acts the Congress of the United States has exercised jurisdiction of this subject to the exclusion of the states. This act is also found in the Compiled Statutes of the United States, Sections 8631 to 8639 d. The Act is entitled:

"An act to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

Section 2 provides:

"From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The sections following provide for a system of inspection, the appointment of inspectors, how rules for

inspection shall be formulated and promulgated, the duties of inspectors, how the act shall be enforced and the penalty.

The amendment of March 4, 1915, 38 Stat. L. 1192 provides:

"Sec. (1) That section two of the act entitled 'an act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,' approved February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof.

Sec. (2) The chief inspector and the two assistant chief inspectors, together with all the district inspectors, appointed under the act of February seventeenth, nineteen hundred and eleven, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said act of February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. That upon the passage of this act all inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed by this act.

Sec. (3) Nothing in this act shall be held to alter, amend, change, repeal or modify any other act of Congress than the said act of February seventeenth, nineteen hundred and eleven, to which reference is herein specifically made, or any order of the Interstate Commerce Commission promulgated under the safety appliance act of March second, eighteen hundred and ninety-three, and supplemental acts."

SPECIFICATION OF ERRORS.

For a reversal of this case we rely upon the assertion that the court below erred in the following and each of the following respects, which are set forth in the assignment of errors filed in the court below (R. 19) to wit:

> "First. The Court erred in holding that the Act of the Legislature of the State of Georgia, approved on the 13th day of August, 1924, and entitled:
>
> > 'An Act to require all steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this State, to provide and equip each and every steam locomotive so operated over its said road or roads in this State with an automatic door to the firebox of such locomotive engine; to provide how the same shall be constructed and operated; to provide a penalty for steam railroads who fail to provide and maintain in good condition such automatic firebox doors, and for other purposes,'
>
> to be unconstitutional and invalid insofar as it undertakes to apply to locomotives within the provisions of the Act of Congress approved February 17, 1911, and the Act amending the same approved March 4, 1915, and the Act approved June 7, 1924, further amending the same, the said original Act of Congress being entitled:
>
> > 'An Act to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.'
>
> Second. The court erred in decreeing that the defendant be enjoined from applying the said Act of the Legislature of Georgia to locomotives of complainant with the provisions of the aforementioned Act of Congress."

POINTS AND AUTHORITIES.

NO POWER TO ORDER THE USE OR INSTALLATION OF EQUIPMENT OF ANY KIND IS GIVEN THE INTERSTATE COMMERCE COMMISSION BY THE FEDERAL BOILER INSPECTION ACT OF 1911 OR THE AMENDMENTS THERETO.

Baltimore and Ohio R. Co. vs. Groeger, 266 U. S. 521, 45 Sup. Ct. Rep. 169;

Vandalia Railroad Co. vs. Pub. Service Comm., 242 U. S. 255, 61 L. ed. 276.

WHERE THE BODY OF A STATUTE IS FREE FROM AMBIGUITY IT CANNOT BE MODIFIED OR ENLARGED BY RESORT TO THE TITLE.

Caminetti vs. United States, 242 U. S. 470, 490, 61 L. ed. 442, 455;

Makenzie vs. Hare, 239 U. S. 299, 308, 60 L. ed. 297, 300;

Lapina vs. Williams, 232 U. S. 78, 92; 58 L. ed. 515, 520.

POWERS NOT EXPRESSLY GIVEN CANNOT BE IMPLIED.

Atlantic Coast L. Ry. Co. vs. Georgia, 234 U. S. 280, 292; 58 L. ed. 1312, 1318;

Baltimore and O. Ry. Co. vs. Groeger, 266 U. S. 521, 45 Sup. Ct. Rep. 169;

Vandalia Ry. Co. vs. Public Service Comm., 242 U. S. 255, 259; 61 L. ed. 285;

United States vs. Pennsylvania Rd. Co., 242 U. S. 208, 221; 61 L. ed. 251, 261;

I. C. C. vs. Cinn. N. O. & T. P. Ry. Co., 167 U. S. 479, 494; 42 L. ed. 243, 251.

THE LIMITED FIELD OF REGULATION OCCUPIED BY CONGRESS CANNOT BE CONSTRUED INTO AN INTENTION TO ENTIRELY OCCUPY THE FIELD TO THE EXCLUSION OF THE STATES.

Roberts Federal Liabilities of Carriers, Vol. 1, Sec. 17, pg. 57;

Missouri K. T. R. Co. vs. Harris, 234 U. S. 412, 417; 58 L. ed. 1377, 1381;

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612, 623; 53 L. ed. 352, 361;

Southern R. Co. vs. Reid, 222 U. S. 424, 437; 56 L. ed. 257, 260;

Sinnot vs. Davenport, 22 How. 227, 243; 16 L. ed. 243, 247;

Savage vs. Jones, 225 U. S. 501, 533; 56 L. ed. 1182, 1194;

Lake Shore and Michigan S. Ry. vs. State of Ohio, 173 U. S. 285; 43 L. ed. 702.

THE REGULATIONS MADE BY CONGRESS ARE LIMITED TO THE FIELD OF SAFETY. THE AUTOMATIC FIREDOOR REQUIRED BY THE GEORGIA STATUTE IS NOT PRIMARILY INTENDED TO PROMOTE SAFETY AND IS SUBJECT TO STATE REGULATION.

Chicago and N. W. Ry. Co. vs. Railroad Comm. of Wisc., 205 N. W. 932 (Wisc.).

THE STATE OF GEORGIA MAY PROTECT THE TRAVELLERS UPON ITS HIGHWAYS AND THE STATUTE REQUIRING AUTOMATIC FIREDOORS HAS A REASONABLE RELATIONSHIP TO THAT END.

Erie R. R. Co. vs. Public Utility Commissioners, 254 U. S. 394, 410; 65 L. ed. 322, 333;

Erb vs. Morash, 177 U. S. 584, 587; 44 L. ed. 897, 898;

Crutcher vs. Kentucky, 141 U. S. 47, 61; 35 L. ed. 649, 653.

THE STATUTE OF THE STATE OF GEORGIA IS A VALID EXERCISE OF THE RESERVED POLICE POWER AND IS NOT A REGULATION OF COMMERCE.

Atlantic C. L. Ry. Co. vs. Georgia, 234 U. S. 280, 58 L. ed. 1312;

Smith vs. Alabama, 124 U. S. 465, 481; 31 L. ed. 508, 513.

Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465;

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214;

Missouri P. R. Co. vs. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330;

Chicago R. I. & P. R. Co. vs. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275;

Minnesota Rate Cases (*Simpson vs. Shepard*), 230 U. S. 352, 402, 410, 57 L. ed. 1511, 1542, 1546, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729.

CONGRESS HAS DEFINITELY RESERVED TO ITSELF ALL POWER TO ORDER EQUIPMENT OF ANY KIND.

Atlantic C. L. Ry. Co. vs. Georgia, 234 U. S. 280; 58 L. ed. 1312;

Sec. 26 Transportation Act 1920; 41 Stat. L. 498; U. S. Comp. Stat. Supp. 1923. Sec. 8596. b.

IN THE ABSENCE OF THE EXERCISE OF THE POWER TO REGULATE BY CONGRESS SUCH POWER IS RESERVED TO AND MAY BE EXERCISED BY THE STATES.

Atlantic C. L. Ry. Co. vs. Georgia, 234 U. S. 280, 291; 58 L. ed. 1312;

Vandalia R. Co. vs. Public Service Comm., 242 U. S. 255; 61 L. ed. 276.

BRIEF OF ARGUMENT.

The only issue presented by this record is the legal proposition that by virtue of the Federal Boiler Inspection Act and its Amendments, enacted pursuant to the commerce clause of the Constitution of the United States, the Congress of the United States has occupied the "entire field" of legislation with respect to steam locomotives of common carriers engaged in interstate commerce and therefore the law of the State of Georgia, providing that certain locomotives be equipped with an automatic door to the firebox and any action on the part of the Attorney General of Georgia seeking to enforce compliance with that law would be in conflict with the paramount power of Congress, in violation of the Federal Law and of the Constitution of the United States.

At the outset it is important to note that **The Congress of the United States has Not Enacted Any Law Dealing with the Subject of Firedoors, nor has the Interstate Commerce Commission, by Virtue of the Federal Boiler Inspection Law or Any Other Law, Promulgated Any Rule or Regulation Dealing with that Subject.**

Under these circumstances it is not and can not be contended that there is an actual conflict or repugnancy between the law of the State of Georgia here in issue and some Federal law or regulation, but the contention is that by the enactment of the Boiler Inspection Law, the Congress has indicated an intention to fully occupy the field to the exclusion of the states.

NO POWER TO ORDER THE USE OR INSTALLATION OF EQUIPMENT OF ANY KIND IS GIVEN THE INTERSTATE COMMERCE COMMISSION BY THE FEDERAL BOILER INSPECTION ACT OF 1911 OR THE AMENDMENTS THERETO.

Stating the position of appellant in negative form it is not our contention that the Interstate Commerce Commission is without power to require equipment of any kind. We most earnestly contend, however, that the Boiler Inspection Act, if it gives power to the Commission to require equipment, is strictly limited to such as is "essential" to "safety in operation." The court below gives weight to the fact that the commission has required such appurtenances as headlights, cab windows, whistles and sanding apparatus, and states this "is practical construction by it of its powers." (R. 17) The court also points out (R. 16) that:

> "The Chief Inspector has several times reported the desirability of automatic firedoors, such as are required by the Georgia statute, but the carriers have not proposed nor the Commission required a rule of inspection providing for these."

We respectfully submit this failure or refusal is a much weightier construction of its powers by the Commission. Section 7 of the Act makes it the duty of the Chief Inspector to make an annual report to the Commission and to make such recommendations for the betterment of the service as he may desire. In several annual reports the installation of automatic firedoors has been recommended. The Commission is not left impotent by the law. It is not required to await action by the carriers for a rule on such recommendations. It has the power to promulgate rules. We contend that the fact it has not acted on the recommendation of the Chief Inspector, made

in compliance with the law, is a clear indication of its opinion that it lacks the power to order such equipment by rule.

Paragraph (1) of the act contains various definitions. Paragraph (2) declares that after a date certain it shall be unlawful for any common carrier to use any locomotive engine propelled by steam power in interstate commerce "unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put." It is then provided that all boilers shall be inspected from time to time in accordance with the provisions of the act and be able to withstand such test or tests as may be provided in the rules and regulations provided for.

Section 3 provides for the appointment of boiler inspectors and sets forth their duties which are:

> "They shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of the act and the rules, regulations and instructions made or given hereunder are observed by common carriers subject hereto."

Section 4 provides that the country shall be divided into districts, fifty inspectors appointed and assigned to the various districts and gives the qualifications of the inspectors.

Section 5 provides that each carrier subject to the act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three (3) months after the approval of the act and after hearing and approval by the Interstate Commerce Commission such rules and instructions with such modifications as the commission requires shall become obligatory upon the carrier. It then provides that if any carrier subject to

the act fails to file its rules and instructions, the chief inspector shall promulgate rules and regulations and that after the same had been approved by the commission and served upon the carrier, the same should become obligatory.

It will be noted that this section of the act assumes that the carriers have rules and regulations and that there is an inspection system in force on the various carriers. To provide uniformity as nearly as possible, inspection by the carrier is made obligatory, and such inspections must be made either under rules and regulations approved by the commission or promulgated by it.

Section 6 of the act sets forth the duties of the various inspectors. Among other things it is provided, with respect to the inspector:

> "His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service."

The act then provides that the carriers shall file reports; that inspectors may order defective locomotives out of service, for appeals from such action of inspectors, for an annual report of the chief inspector, for report and investigation of accidents. A penalty is provided and the method and manner of enforcement.

The amendment of March 4, 1915, merely provides that the provisions of the original act shall extend to and cover the locomotive, the tender and all their parts and appurtenances and that the inspector shall have the same duties and powers with respect thereto as the original act gave with reference to the boilers.

Acting under authority of the original act the Interstate Commerce Commission established a set of "Rules

and instructions for inspection and testing of locomotive boilers and their appurtenances." The first statement of the first rule is a clear indication of the view the Interstate Commerce Commission takes of the limited powers that were delegated to it by this act. It is as follows:

RESPONSIBILITY FOR THE GENERAL CONSTRUCTION AND SAFE WORKING PRESSURE.

"1. The railroad company will be held responsible for the general design and construction of the locomotive boilers under its control."

By its first pronouncement the commission disavowed any power or authority to order the carrier, by virtue of the provisions of this act, to adopt any particular design or construction of its boilers or to adopt in the boilers used any parts or appliances. It placed the whole burden as to the safety of the design, construction, and appliances on the carrier. We submit that if the commission considered that it had power or authority under the Original Federal Boiler Inspection Act to order the carriers to use any particular equipment, some provision would have been made in the first regulation whereby the commission would have indicated that it at least retained control over the questions of design, construction and parts to be used.

The regulations adopted and promulgated by the commission plainly indicate they are drawn on the assumption that the item to which the regulation is directed is in use, and the regulations are in the nature of establishing "standards of safety" to which standards the matters under regulation must comply. In a few instances the language of the regulation states that a boiler "shall have, etc. * * *," but as a general rule the regulation simply states that the item under regulation shall comply with the standard set for it. Wherever the regulation states that the boiler "shall have" a particular appliance, it is

plain that the item referred to is an indispensable part of or appurtenance to the boiler or locomotive and essential to safety in operation. For instance:

Rule 28. Provides "Every boiler shall have at least one steam gauge."

Rule 34. Every boiler shall be equipped with at least two safety valves.

Rule 37. Every boiler shall be equipped with at least one water glass and three gauge cocks.

Rule 41. All tubular water glasses and lubricator glasses must be equipped with safe and suitable shield.

Rule 42. All water glasses must be supplied with a suitable lamp.

Rule 119. Cylinder cocks shall be provided and maintained in safe and suitable condition for service.

Rule 120. Locomotives shall be equipped with sanding apparatus.

Rule 121. Each locomotive must be provided with suitable steam whistle.

Rule 122. Provides for two or more safety bars or safety chains between locomotive and tender.

Rule 129. (a) Provides for head lights.

Rule 130. Classification lamps.

Rule 132. Cab lights.

It will be noted that wherever the regulation provides that the locomotive or its boiler "shall have" any named item, the appliance is beyond question a safety appliance, and the conclusion to be reached from the language used by the commission is that the absence of the particular item would, under the rules and regulations, render the locomotive below the required standard, unsafe for operation and it would be ordered out of service.

We submit that if the commission should undertake by regulation to compel the carriers to equip their loco-

motives with any device in which it was debatable whether or not the same was "essential" to "safety in operation" such a regulation would be held by the courts to be unreasonable and inoperative. The commission has undoubtedly recognized this situation and has narrowed the use of the mandatory term "shall have" to such items as are "essential" to "safety in operation" beyond debate. The items so specified are steam gauges, safety valves, water glass and gauge cocks, water and lubricator glass shields, water glass lamps, sanders, whistles, safety bars or safety chains, headlights, classification lamps and cab lights.

It is instructive to compare the language used by the commission in Rule 14 with reference to fusible plugs. The necessity of fusible plugs and even the wisdom of them is open to debate, but who would say that there is any reasonable question as to the absolute necessity of steam gauges, safety valves, water glasses, headlights, etc.? Recognizing the situation with reference to fusible plugs, the commission simply made a rule that if boilers are equipped with fusible plugs, they shall be removed and cleaned at least once every month, but did not make any rule that boilers shall be equipped with fusible plugs. Thousands of locomotives are being used daily without fusible plugs, but can it be conceived that a locomotive would be used without head lights, safety valves, water gauges, etc.?

Even though the commission in the rules and regulations has, with reference to particular items, used mandatory language, this form has been used to indicate that such item is considered an absolute necessity to safety in operation. Failure to provide the item mentioned would necessitate taking the locomotive out of service for the reason that it was unsafe to operate. This would probably produce the same result—namely, of compelling the

carrier to use the specific equipment,—but we submit that this is fundamentally different from the commission having power to *order* the carrier to install the particular equipment. In particular instances the same result will be achieved indirectly by ordering the locomotive out of service, but the distinction is fundamentally of vital importance.

The meaning, purpose and scope of the Boiler Inspection Act were discussed by this Court in the case of *Baltimore and O. R. Co. vs. Groeger,* 266 U. S. 521; 45 Sup. Ct. 169. This was an action for damages arising out of the death of an engineer. The provisions of this law were drawn in question. In the course of the opinion this Court said by Mr. Justice Butler (page 528):

> "By the last mentioned section (section 2) defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. The carriers were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger. *The things required for that purpose were not prescribed or changed by the act;*" etc. (Italics ours)

The court further said (page 530):

> "The act required a condition which would permit use of the locomotive without unnecessary danger. *It left to the carrier the choice of means to be employed to effect that result.* * * * There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. *It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical*

means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end." (Italics ours)

If the act gave the Commission power to prescribe how the boilers should be kept safe or the things that would be required for that purpose how could it be said that the carriers were left free to so determine?

The firedoor is an integral portion of the boiler as is a fusible plug, and in discussing the latter with reference to the safety of the boiler this Court said:

> "It may well be left to their (the carriers') officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end."

If the original Boiler Inspection Act did not prescribe those things which were necessary to keep the boilers in proper condition for use without unnecessary danger, nor give the Commission power to so prescribe, but left the carriers free to decide the engineering questions involved, certainly the amendment of March 4, 1915, made no change with reference to the boilers and merely extended the operation of the original act to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof." That is the language of Section 1 of the amendment and Section 3 specifically provides:

> "That nothing in this act shall be held to alter, amend, change, repeal or modify any other act of Congress than the said act of February seventeenth, nineteen hundred and eleven, to which reference is

herein specifically made, or any order of the Interstate Commerce Commission promulgated under the safety appliance act of March second, eighteen hundred and ninety-three, and supplemental acts."

This act as amended was also under consideration by this Court in the case of *Vandalia Railroad Company vs. Public Service Commission*, 242 U. S. 255, 61 L. ed. 276. This is the *Indiana Headlight Law Case* and this Court held that it was not necessary to decide whether or not the amendment of 1915 authorizes the Interstate Commerce Commission to prescribe any particular type of headlight, or other appliance. The court did not decide that question but appears to cast a serious on such authority. We call attention to this careful and significant language, page 259:

> "The amendment of 1915 extends the provisions *respecting inspection*, etc., to the entire locomotive and its appurtenances."

This appears to be a clear indication that the original act was confined to "inspections" and that the amendment merely extended it in that respect.

WHERE THE BODY OF A STATUTE IS FREE FROM AMBIGUITY IT CANNOT BE MODIFIED OR ENLARGED BY RESORT TO THE TITLE.

From the opinion of the learned court below it would appear that the title of the Act of 1911 was relied upon to determine the purpose of the Act, which purpose was not enlarged or extended by any of the amendments but only to extend its field of operation to cover the locomotive, tender and their parts as well as the boiler. In its opinion (R. 17) the court said:

> "The title of the Act of 1911 states that its purpose was to 'Compel common carriers engaged in interstate commerce to equip their locomotives with safe

and suitable boilers and appurtenances thereto,' not simply to inspect and keep in order such boilers and appurtenances as they had."

The court grounded its decision on the compulsion mentioned in the title although nothing whatever is said in the body of the Act, or in any of the amendments, giving power to any body or person to compel the use of any equipment. We submit that the purpose of the Act as contained and set forth in the body thereof cannot be enlarged by reference to the title, and where the body of the statute is free from ambiguity the meaning expressed therein must be given effect without resort to the title.

This subject was fully discussed and the rule laid down by this Court in the case of *Caminetti vs. United States*, 242 U. S. 470, 61 L. ed. 442. In that case, after citing many authorities, this Court said, page 490:

> "But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

Makenzie vs. Hare, 239 U. S. 299, 308; 60 L. ed. 297, 300;

Lapina vs. Williams, 232 U. S. 78, 92; 58 L. ed. 515, 520.

In the case at bar the language of the original statute and the amendments are plain and unambiguous. They deal solely with inspection and nowhere is any reference made, directly or indirectly, to compelling carriers to equip their locomotives with appliances of any kind.

On this subject of the authority given to the Interstate Commerce Commission by the Boiler Inspection Act and the amendments thereto, we feel we should bring to the notice of this Court the diametrically contradictory attitude of the carriers, including the appellee, when before the Commission discussing its authority and before the court challenging a state statute. Section 5 of the original act required each carrier, within three months, to file with the chief inspector its rules and instructions for the inspection of locomotive boilers. After hearing and approval by the Commission, such rules and instructions, with any modifications required by the commission, are made obligatory upon the carriers. In the event any carrier failed to file its rules and instructions, the chief inspector was empowered to prepare rules and instructions which, after approval by the Commission and service on the carrier were made obligatory upon the latter. By the amendment of 1915 these provisions were made to apply to the entire locomotive, the tender and all their parts and appurtenances.

To secure uniformity, conferences were held to consider rules at which one hundred and fifty-six railroad companies, including the appellee, with a mileage of 215,000 miles, were represented by a special committee. Substantial agreements were arrived at in conference with the chief Inspector on proposed rules with the exception of rules requiring headlights and automatic bell ringers. These were referred to the Interstate Commerce Commission and hearings held. In these hearings the carriers were represented by eminent counsel. In the discussion of a proposed rule to require locomotives to be equipped with automotic bell ringers, counsel for the carriers, including appellee, is reported on pages 61 and 62 of the official stenographers minutes to have said:

"Our view of the law with respect to the bell ringer is precisely the same as our view as to the head lights; that, as long as there are state statutes, as long as there are ordinances of cities and villages requiring bells to be rung, there must be a bell and the bell must be rung. But, sirs, we say that how that bell should be rung and in what way it should be rung is not a matter for the bureau of boiler inspection to prescribe and that the law does not contain authority to them to prescribe how that should be done."

"And we say that that should be left to the railroad companies and further than that, perhaps to the municipalities through which the railroad companies run."

If the Bureau of Inspection may not prescribe *how* a bell should be rung, can it prescribe how a firedoor shall be operated? If it may be left to a municipality to prescribe, why not to a state?

Subsequent to the hearings, a brief was filed on behalf of the special committee of the railroads. In the statement of the case and on page 8 of their brief, it is stated:

"The carrier also raised the point of law that the Boiler Inspection Act of 1911, as amended by the Act of March 4, 1915, did not confer upon the Bureau of Locomotive Boiler Inspection or upon Interstate Commerce Commission power to prescribe any particular kind, type or design of a locomotive or its appurtenances or any of them."

On page 76 of their brief they state and discuss the following proposition of law:

"The Boiler Inspection Act of nineteen hundred and eleven, as amended by the Act of March 4, 1915, imposed no duty and confers no authority upon the Interstate Commerce Commission other than to approve or to modify rules for the inspection of locomotives and their appurtenances."

In the discussion of this proposition, the following is stated on behalf of the carriers, including the appellee, on page 79 of the brief:

> "There is nowhere in the Act of 1911 or in the Act of 1915 either a requirement or even a permission, direct or indirect, to the Bureau of Locomotive Boiler Inspection, or to any other body or person, to require a particular kind of construction or a particular type of equipment."

It is manifestly impossible for the carriers, including appellee, to be correct in both instances. Admittedly the Congress has passed no law on the subject of firedoors. They contend to the Commission that neither the act of 1911 nor the amendment of 1915 contains either a requirement or even a permission, direct or indirect, to any body or person whatsoever to require a particular kind of construction or type of equipment. Without subscribing to this all embracing contention, we submit that to now hold that the states are without authority to regulate firedoors is to say that there are instrumentalities of interstate commerce not subject to regulation unless and until Congress has acted directly thereon. This would be contrary to all the authorities.

POWERS NOT EXPRESSLY GIVEN CANNOT BE IMPLIED.

There are certain fundamental principles regarding the respective powers of Congress and the states relating to the regulation of interstate commerce so well settled as to have become almost axiomatic and need neither argument nor citation of authorities. The mere grant of power to Congress does not exclude the states. The exercise of the power by Congress, however, is paramount, to the exclusion of the states, and any and all state statutes in

conflict with the federal regulations are rendered inoperative and void. Federal statutes, however, are strictly construed and state regulations are valid unless they are repugnant to or in conflict with the federal regulations or Congress has clearly manifested an intention to fully occupy the field. The rule is given in both positive and negative form in *Atlantic Coast Line R. R. Co. vs. Georgia,* 234 U. S. 280, 58 L. ed. 1312. This Court by Mr. Justice Hughes said at page 292:

> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. *That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders,* but it does lie in exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

This Court passed upon the powers given the Commission in the case of *B. and O. Rd. Co. vs. Groeger, supra,* and held that the carriers are left free to determine the means to be used in complying with their duties under the act.

Another reference to the powers given to the Interstate Commerce Commission, by virtue of the Federal Boiler Inspection Act, and its amendments, is the negative statement contained in the opinion in the *Indiana Headlight Law Case, Vandalia Railroad Company vs. Public Ser-*

vice Commission, 242 U. S. 255, 61 L. ed. 276, decided December 11, 1916. It will be noted that the opinion in this case was announced subsequent to the amendment of 1915 extending the original act, so as to comprise the locomotive, tender and all their parts and appurtenances.

While it was not necessary in the determination of this case, the question was involved as to whether or not the amendment gave the Commission authority to prescribe any particular type of headlight. In discussing the amendment this Court said (page 259):

> "The amendment of 1915 extends the provisions *respecting inspections*, etc., to the entire locomotive and all its appurtenances. Whether those provisions authorize the Interstate Commerce Commission to prescribe any particular type of headlight, or other appliance, is a question upon which we need not now pass, for the reason that the decision of the Supreme Court of Indiana, refusing an injunction to restrain the enforcement of the State Commission's order, was rendered and judgment thereon entered before the passage by Congress of the act referred to." (Italics ours)

It is our contention that the federal act is an "Inspection" law, and in the case last noted this Court carefully points out that the amendment of 1915 extends the "provisions respecting inspections etc." In the *Georgia Headlight Law Case*, 234 U. S. 280, *supra*, which was prior to the amendment of 1915, this Court held that a Georgia statute, providing for a specified headlight, was not in conflict with the original law, as that related to boilers. The Court said page 294:

> "The intent to supersede the exercise of the state's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken."

In the case of *United States vs. Pennsylvania Railway Company*, 242 U. S., 208, in discussing the power of the Interstate Commerce Commission to order the carriers to provide or furnish tank cars, the court quoted with approval the following language, page 221:

> "A power so extraordinary and so vital reached by construction could not justly rest upon any less foundation than that of direct expression or necessary implication, and we can find neither of these in the statute."

Again in the case of *I. C. C. vs. Cinn. N. O. & T. P. Ry. Co.*, 167 U. S., 479, in discussing the power of the Commission to fix rates under the first act to regulate commerce the court by Mr. Justice Brewer at page 494 said:

> "The grant of such power is never to be implied."

The Georgia automatic fire door law requires the installation of certain specified equipment. The court below holds this is in violation of the Federal law as the Interstate Commerce Commission under the Federal boiler inspection act has exclusive jurisdiction of this matter. This means, that if deemed necessary or advisable, the Commission exclusively could order the installation of such equipment. This is merely an inferred or implied power in the commission and we have shown that the carriers themselves would be the very last to concede—and deny—that the boiler inspection law clothes the Interstate Commerce Commission with any power to order the installation of any equipment of any character for any purpose, and such tremendous power is not to be implied or inferred.

THE LIMITED FIELD OF REGULATION OCCUPIED BY CONGRESS CANNOT BE CONSTRUED INTO AN INTENTION TO ENTIRELY OCCUPY THE FIELD TO THE EXCLUSION OF THE STATES.

This doctrine has been repeatedly announced and confirmed by many decisions of this Court. The rule is very clear, and unless Congress has plainly manifested its intention to occupy the whole field to the exclusion of the states, and the state statute is so repugnant to the Federal statute that they both cannot operate together, the state power of regulation is not ousted.

The problem in each case is stated in *Roberts Federal Liabilities of Carriers,* Vol. 1, Sec. 17, where the author says (page 57):

> "While the principle that congressional action over interstate commerce renders state laws occupying the same field or dealing with the same subject matter inoperative, has been unquestionably established and repeatedly applied, the greatest difficulty in the practical administration of the law is to determine the exact boundary of the field or the extent of the subject matter covered. *If the state and the national law do not apply to the same subject matter, both are valid.* If they cover the same field or subject matter, the state law must give way." (Italics ours)

The question in the case at bar is, "what is the subject matter covered by the Boiler Inspection Act and its amendments?" We contend that it is to promote safety in operation by requiring adequate inspections.

There is no evidence in this case and nothing in the Georgia statute indicating that the purpose of the automatic firedoor provided for is to promote safety in operation. It is claimed that on the happening of certain contingencies it tends to increase the safety of the engineer and firemen in the cab, and may incidentally affect and

increase safety in operation, but the real purpose is for the protection, health, comfort, convenience and general welfare of those engaged in firing and driving the locomotives. We submit this is a field of regulation untouched by the federal safety statute, and unless the state requirement is in actual conflict with or repugnant to the federal regulation, the state requirement is valid.

In the case of *Missouri K. T. R. Company vs. Harris*, 234 U. S., 412, 58 L. Ed., 1377, this Court by Mr. Justice Pitney at page 417, said:

> "But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the *welfare* and *convenience* of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with." (Italics ours)

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S., 612, 623; 53 L. Ed., 352, 361; 29 Sup. Ct. Rep. 214;

Southern R. Co. vs. Reid, 222 U. S., 424, 437; 56 L. Ed., 257, 260; 32 Sup. Ct. Rep., 140.

In this case, a statute of the State of Texas, allowing an attorney's fee for collection of a claim against a railroad was challenged as unconstitutional in the light of the Carmack amendment. This amendment covers the specific subject matter of the liability of a carrier for loss or damage to property. The state statute expressed an added liability in the nature of costs by providing that the carrier would be liable for an attorney fee. We submit that in that case, the state statute was more in the field of regu-

lation covered by the Carmack amendment than is the Georgia statute in the field covered by the Federal Boiler Inspection Act in the instant case.

This Court, however, held the Texas statute to be constitutional and not repugnant to Federal legislation. The Court said (page 418):

> "These cases recognize the established rule that a state law enacted under any of the reserved powers —especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In *Reid v. Colorado*, 187 U. S. 137, 148, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the *repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*" *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247.' In *Savage v. Jones*, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said 'When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to the regu-

lation of Congress within the sphere of its delegated power (citing cases). But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. *In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*'" (Citing many cases.) (Italics ours)

In *Lake Shore and Michigan Southern Ry. vs. State of Ohio*, 173 U. S. 285, 43 L. ed. 702, the third proposition of the syllabus states:

> "The power of the state by appropriate legislation to provide for the public convenience stands upon the same grounds as its power by appropriate legislation to protect the public health, the public morals or the public safety."

This is a clear statement that the instrumentalities of commerce may be regulated in several aspects, and if the Federal power has been exercised in regard to one aspect, the states have power to regulate in the others so long as there is no *actual repugnance*.

THE REGULATIONS MADE BY CONGRESS ARE LIMITED TO THE FIELD OF SAFETY. THE AUTOMATIC FIREDOOR REQUIRED BY THE GEORGIA STATUTE IS NOT PRIMARILY INTENDED TO PROMOTE SAFETY AND IS SUBJECT TO STATE REGULATION.

If the Interstate Commerce Commission has any authority by virtue of the powers delegated to it by the Federal Boiler Inspection Law, to require the use of any specific equipment, it can only require such as is necessary to carry out the purpose of the Act, namely, safety in operation. The Act will be strictly construed and, as here-

tofore pointed out, the railroads of the country, including appellee, have argued before the commission that it has no power to prescribe any particular kind, type or design of a locomotive or its appurtenances or *any* of them. In *Baltimore and O. R. Co. vs. Groeger, supra,* this Court held that under this law the railroad is bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. The Court also held, however, that "the things required for that purpose were not prescribed or changed by the Act" and further "that it may well be left to the engineers and officers of the railroads to decide the means to that end." The law neither prescribed the means nor did it delegate the power to so prescribe.

The court below (R. 16) refers to the fact that the Chief Inspector, in compliance with his duties imposed by the law, has in several of his annual reports reported the desirability of automatic firedoors, such as are required by the Georgia Statute, but that the commission has not required a rule of inspection providing for the same. We submit that the commission does not consider automatic firedoors *essential* to safety in operation and that it is therefore without power to require such a rule.

The view of the commission of the nature and purpose of this device is revealed in a recent report of investigation of boiler explosion on Pennsylvania engine No. 64 near Summit, Ohio on Nov. 23, 1925. This report is made jointly by inspectors for the Interstate Commerce Commission and the Public Utilities Commission of Ohio. This report shows that the locomotive had a swinging type firedoor and the latch was badly worn. The report states:

> "The result of the explosion in the firebox when the crownsheet blew down had a distressing effect in the cab when the force of explosion blew the swinging

firedoor open, permitting the full pressure of steam to escape into cab making it a veritable death trap and taking the lives of three men.

We believe if this locomotive had been equipped with an automatic firedoor as provided by law, there would not have been even slight injury sustained by the men as the purpose of the automatic door is to *protect* the men in the cab under just such circumstances that occurred in this case."

This is a clear statement of the view of the commission of the purpose of the firedoor required by an Ohio statute which is almost identical with the Georgia statute. The report of investigation of this particular explosion is also significant in this, that the train coasted a distance of 6900 feet before coming to a stop. No other damage was done to the train and it "operated safely" for over a mile before coming to a stop. The automatic firedoor would not have prevented nor tended to prevent the explosion, nor could it have affected the safety of the train after the explosion. The automatic firedoor could not have blown open, as did the swinging door, and it would have protected the employees in the cab. Such automatic firedoor might incidentally affect the safety of the train, after such an explosion, in that, the employees being safe, they might be able to bring the train under control. This however, is both problematical and incidental as the explosion might well wreck the controlling mechanism. A prime purpose of the automatic firedoor, expressed by the inspectors for the Interstate Commerce Commission is the protection of the employees in the event of an explosion in the firebox.

The same purpose is stated in the evidence in the case at bar. (R. 20.) In addition to the foregoing it is stated that the automatic firedoor conserves the health of the fireman by protecting him from exposure to extremes of heat and cold while performing his duties, also conserves his

eyesight by reducing the amount and extent of exposure to the glare of the fire.

We have heretofore shown that the Federal Boiler Inspection Act covers and is limited to the field of inspection to promote safety in operation, and submit that this does not occupy the entire field of regulation nor enter the field touching the health, convenience or general welfare of the employees.

This is also the view taken by the Supreme Court of the State of Wisconsin in some recent cases decided Nov. 17, 1925 involving the constitutionality of a somewhat similar statute of that state. *Chicago and Northwestern Railway Company vs. Railroad Commission of Wisconsin,* 205 N. W. 932. The statute of the State of Wisconsin prohibits the use of locomotives within certain dates, unless equipped with cab curtains. This statute was challenged by the railroads as imposing an undue burden on interstate commerce and as conflicting with Federal legislation and rules of the Interstate Commerce Commission.

In its decision the Supreme Court of Wisconsin points out that the law was enacted for the purpose of promoting the public health and comfort; that, as such it is a police regulation and within the powers of the state and that, but for the fact that the legislation touches an instrumentality of interstate commerce, the power of the state could not be questioned. The court then discusses the Federal Boiler Act and points out that it is a safety Act, pure and simple. Section 2 requires locomotives to be "safe to operate." The purpose of the Act is to promote the "safety" of the public and employees. The court then says:

> "The power of Congress to promote safety in the prosecution of interstate commerce is one subject of legislation. The power of the state to promote the health and welfare of its citizens is quite another. By the exercise of the first power the states do not lose

the second, and the legislation of each jurisdiction will stand unless they be repugnant to each other."

This is the contention of the appellant herein and we submit that if the Interstate Commerce Commission should, by virtue of the Boiler Inspection Act, undertake to require by rule anything intended primarily to promote the health, welfare or convenience of the employees, such attempted exercise of power by the Commission would immediately be challenged. In view of the cold in the north we suggest a rule requiring enclosed vestibule cabs equipped with a radiator and in view of desert conditions a rule requiring fans and drinking water in the cab.

THE STATE OF GEORGIA MAY PROTECT THE TRAVELLERS UPON ITS HIGHWAYS AND THE STATUTE REQUIRING AUTOMATIC FIREDOORS HAS A REASONABLE RELATIONSHIP TO THAT END.

The effect on the vision of the fireman by working in the glare of the fire with the old type swinging doors has been referred to, viz:—that for the time being he is practically blinded. A lookout must be maintained at all times for persons or vehicles approaching at railroad crossings and it is obvious that this is as essential on the fireman's side of the locomotive as the engineer's. It is physically impossible for the engineer to watch both sides. As a matter of fact, the rules require the fireman to keep a lookout on his side.

The right of the states to protect travellers on its highways has been repeatedly upheld by this Court. This principle was discussed by this Court in the case of *Erie R. R. Co. vs. Public Utility Commissioners*, 254 U. S. 394, 410; 65 L. ed. 322, 333. In that case the Board of Commissioners of the State of New Jersey had made an order requiring a change of grade at a number of street cross-

ings. The order was assailed as an interference with interstate commerce and in violation of the commerce clause of the constitution. In upholding the order this Court said, page 410:—

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires."

Again, in the case of *Erb vs. Morash*, 177 U. S. 584, 587; 44 L. ed. 897, 898, in upholding an ordinance of Kansas City limiting the speed of trains within its limits to six miles per hour this Court said, page 587:

> "A city when authorized by the legislature may regulate the speed of railroad trains within the city limits * * *. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce and is within the power of the state until at least Congress shall take action on the matter."

And in *Crutcher vs. Kentucky*, 141 U. S. 47, 61; 35 L. ed. 649, 653, this Court said, page 61:

> "It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

THE STATUTE OF THE STATE OF GEORGIA IS A VALID EXERCISE OF THE RESERVED POLICE POWER AND IS NOT A REGULATION OF COMMERCE.

The court below held (R. page 16) that:

> "The state statute here in question concerning itself solely with the locomotives of railroad companies, seems more clearly a regulation of commerce than a police regulation for the good of the general public."

This view of the statute appears to have materially influenced the decision of the learned court below and we respectfully submit it is not in accordancee with the holdings of this Court. By an unbroken line of decisions this Court has held that such requirements by state statutes are a valid exercise of the reserved police power of the states and are not *per se* regulation of interstate commerce even though they indirectly and incidentally affect it. To be repugnant to the commerce clause of the constitution the state statute must impose a direct burden on and interference with interstate commerce.

This question is almost invariably raised in a challenge of a state statute of this character. It was discussed by this Court and the rule stated in *Atlantic C. L. Ry. Co. vs. Georgia,* 234 U. S. 280, 58 L. ed. 1312. In holding that the headlight law of Georgia was not a regulation of interstate commerce this Court said pg. 291:

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation. We may repeat what was said in *Smith v. Alabama,* 124 U. S. 465, 481, 482, 31 L. ed. 508, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: 'It is to be remembered that railroads are not natural highways of trade and commerce. * * * The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local

law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.'

Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28;

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086;

New York, N. H. & H. R. Co. v. New York, supra;

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465;

Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214;

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330;

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275;

Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 402, 410, 57 L. ed. 1511, 1542, 1546, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729."

In the case at bar neither the Congress of the United States nor the Interstate Commerce Commission has made any rule or regulation on the subject of firedoors. As a matter of fact, the commission has failed or refused to make any regulation in spite of the repeated recommendations of the Chief Inspector. As stated by Mr. Justice Hughes in the *Georgia Headlight* case, *supra*, the remedy is simple—it does not rest in a denial to the state of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress.

The same question is briefly discussed and quickly disposed of in *Vandalia R. Co. vs. Public Service Commission*,

242 U. S. 255, 61 L. ed. 276. In that case this Court said by Mr. Justice Pitney at page 258:

> "So far as the attack upon the Act of 1909 and the order made pursuant to it is based upon interference with interstate commerce, it very properly is conceded that, but for a recent act of Congress, the case would be controlled by *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 290, 58 L. ed. 1312, 1317, 34 Sup. Ct. Rep. 829, (259) where it was held that, in the absence of Federal legislation, the states are at liberty in the exercise of their police power, to establish regulations for securing safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce; and that the Safety Appliance Acts of Congress, since they provided no regulations for locomotive headlights, showed no intent to supersede the exercise of state power with respect to this subject."

CONGRESS HAS DEFINITELY RESERVED TO ITSELF ALL POWER TO ORDER EQUIPMENT OF ANY KIND.

Under the original act to regulate commerce, the Interstate Commerce Commission held it was without power to order carriers to furnish equipment. Under the amendment to that act, the Commission undertook to order a carrier to furnish specified equipment. This order was set aside by this Court in *United States vs. Penn. Ry.*, 242 U. S., 208, *supra*. The Court pointed out that the carriers "are left free to exercise their own judgment in the matter of equipment." In the rate case, *I. C. C. vs. Cinn. N. O. and T. P. Ry. Co.*, 167 U. S. 479, *supra*, it was held that such powers are never implied.

We have been unable to find any instance in which the Commission, under its general powers, has ordered the carriers to install or use any specific equipment not already

in general use. Whenever under its rules for inspection it is provided that the locomotive shall have any specified item, such item was being generally used.

In the *Georgia Headlight Law* case, 234 U. S. 280, *supra*, in which this Court held that the original Boiler Inspection Act did not cover headlights, nor oust the states of their power to regulate with regard to the same, the various acts of Congress requiring equipment were referred to, page 293:

> The act of March 2, 1893, chap. 196 (27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174), relating to power driving-wheel brakes for locomotives, grab irons, automatic couplers, and height of drawbars; the act of March 2, 1903, chap. 976 (32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1911, p. 1314), amending the act of 1893; the act of May 27, 1908, chap. 200 (35 Stat. at L. 324, 325, U. S. Comp. Stat. Supp. 1911, p. 1325) authorizing the Interstate Commerce Commission to keep informed regarding compliance with the safety-appliance act, and to investigate and report on the need of any appliances or systems intended to promote the safety of railway operations; the act of May 30, 1908, chap. 225 (35 Stat. at L. 476, U. S. Comp. Stat. Supp. 1911, p. 1326), relating to locomotive ash pans; the act of April 14, 1910, chap. 160 (36 Stat. at L. 298, U. S. Comp. Stat. Supp. 1911, p. 1327), relating to sill steps, hand brakes, ladders, running boards, and hand holds, and providing that the Interstate Commerce Commission should, after hearing, designate the number, dimensions, location, and manner of application of these appliances, and of those required by the act of 1893; the detailed regulations prescribed by the Commission, on March 13, 1911, pursuant to this authority; the act of May 6, 1910, chap. 208 (36 Stat. at L. 350, U. S. Comp. Stat. Supp. 1911, p. 1329), requiring the Commission to investigate accidents and make reports as to their causes, with such recommendations as they may deem proper; and the act of February 17, 1911, chap. 103 (36 Stat. at L. 913, U. S. Comp.

Stat. Supp. 1911, p. 1333), relating to locomotive boilers.

The Court then said:

> But it is manifest that none of these acts provides regulations for locomotive headlights. Attention is also called to the investigations conducted by what is known as the "block signal and train control board" (organized by the Commission), and the reports of that board with respect to sundry devices and appliances, including headlights. It does not appear, however, either that Congress has acted, or that the Commission, under the authority of Congress, has established any regulation so far as headlights are concerned. As to these, the situation has not been altered by any exertion of Federal power, and the case stands as it has always stood, without regulation, unless it be supplied by local authority.

None of the above mentioned Acts refers to firedoors. Neither Congress nor the Commission under the authority of Congress, has established any regulation so far as firedoors are concerned, and as stated in the above case, firedoors stand as they have always stood, without regulation, unless it be supplied by local authority.

With reference to the holding of the court below that the field is fully occupied we wish to call attention to Section 26 of the so-called Transportation Act of 1920, 41 Stat. L., 498, U. S. Comp. Stat. Supp. 1923, Sec. 8596 b, page 574. Congress here gives the Commission definite authority to order the carriers to install automatic train stop or train control devices. This is directed to the safety in operation of the train and locomotive and is years after the amendment of 1915 to the original Boiler Inspection Act.

If by virtue of the amendment of 1915 Congress had fully occupied the field of regulation with regard to locomotives why was it necessary to pass any law on the subject

in 1920, and *a fortiori,* if the said amendment gave the commission general power to order equipment why did Congress enact another law solely for the purpose of giving the commission authority to order the installation of specific equipment?

We submit that under well settled rules of construction, this action of Congress demonstrates beyond question that all prior acts cover a limited field, and that it had not up to that time delegated to the Commission any general power to order the carriers to furnish or use equipment of any kind.

IN THE ABSENCE OF THE EXERCISE OF THE POWER TO REGULATE BY CONGRESS SUCH POWER IS RESERVED TO AND MAY BE EXERCISED BY THE STATES.

It is conceded that the Congress of the United States has paramount power to regulate interstate commerce, but the doctrine that in the absence of legislation by Congress the states are not denied the exercise of their power to regulate railroad equipment and operation within their territory has been settled beyond dispute by this Court. The mere grant of power to Congress is not alone sufficient to deprive the states of that power. On this proposition we deem it sufficient to quote the language of Mr. Justice Hughes in *Atlantic Coast Line R. R. vs. Georgia,* 234 U. S., 280. At page 291, he said:

> "In thus deciding the court applied the settled principle that, in the absence of legislation by Congress the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal

action, the use of such agencies, which unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to procure needed local protection."

From the foregoing, we submit that unless the Congress of the United States or the Interstate Commerce Commission, acting under authority of Congress, has made and established regulations with reference to "fire-doors," the State of Georgia is not ousted of authority to do so, and as this has not been done the state statute is not in that respect in violation of any law of the United States.

Vandalia Ry. Co. vs. Public Service Comm., 242 U. S. 255; 61 L. ed. 276.

CONCLUSION.

We therefore respectfully submit that the subject matter covered by the statute of the State of Georgia in controversy is susceptible of regulation by the State of Georgia under its police powers or by the Congress of the United States under the commerce clause of the constitution;

That the exercise of this power by the Congress of the United States would be paramount, would exclude the states from regulation and would invalidate any existing state laws covering the same subject matter;

That the Georgia statute requiring the installation of specific equipment is a police regulation and only incidentally interferes with interstate commerce, and that under the decisions of this Court such a regulation is not *per se* a regulation of interstate commerce, but is valid unless in conflict with or repugnant to some law of Congress or regulation of the Interstate Commerce Commis-

sion passed or made by virtue of the commerce clause of the constitution;

That Congress has not passed any law affecting the subject of fire doors; that neither the Interstate Commerce Commission, nor any other body had made any rule or regulation affecting fire doors; that Congress has not occupied this field of regulation or manifested any intention to occupy the field; that Congress has not delegated to the Interstate Commerce Commission or any other body, power to order equipment of this kind or character; and that the Interstate Commerce Commission has plainly indicated its view that it is without power to order automatic fire doors, by failing to carry out the recommendations made by the chief boiler inspector in accordance with law in his several annual reports.

That the court below erred in holding the Act of the Legislature of the State of Georgia to be unconstitutional and invalid and in decreeing that the appellant be enjoined from applying the said act and that said finding and decree should be reversed.

Respectfully submitted,

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